NO. 45786-5-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

DOT FOODS, INC.,

Respondent/Cross-Appellant,

v.

DEPARTMENT OF REVENUE, STATE OF WASHINGTON,

Appellant/Cross-Respondent.

DOT FOODS' REPLY BRIEF ON CROSS-APPEAL

Michele Radosevich
Dirk Giseburt
Davis Wright Tremaine LLP
Attorneys for Dot Foods, Inc.

1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
(206) 622-3150 Phone
(206) 757-7700 Fax

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Session Laws

Other Authorities

I. INTRODUCTION

In the Reply Brief of Appellant/Cross-Respondent ("DOR Reply") the Department of Revenue ("Department") fails to recognize the unprecedented context of this case. This is a case where (i) a taxpayer obtains a State Supreme Court judgment (in 2009) confirming its exempt status under the B&O tax statutes, (ii) the legislature (in 2010) in effect "reverses" the Supreme Court's interpretation of the exemption statute retroactively, ostensibly on the ground that the legislature's "original intent" in enacting the exemption 27 years previously was to deny the exemption in the taxpayer's situation, (iii) the legislature, however, expressly preserves the taxpayer's judgment from any effect of the retroactive amendment, and (iv) the state tax agency then refuses to refund the tax paid by the very same taxpayer under the very same facts during the period when it was litigating to judgment.

We have no precedent for this combination of circumstances: the legislature's express preservation of a judgment from the effect of a retroactive amendment and the State's attempt to retain tax paid under the exact same business circumstances during the period before the judgment was rendered. In this context, the legislature's language and intent must be very closely examined. This examination will show that the legislature's preservation of Dot Foods' judgment can only be reasonably

interpreted as honoring Dot Foods' tax exemption up to the date of judgment.

Similarly, this case presents an original issue in the context of our Supreme Court's evolving separation of powers jurisprudence. The Department's position would allow the legislature to "disturb previously litigated adjudicative facts" in violation of the state constitution, which our Supreme Court has clearly said the legislature may not do. *Cornelius v. Dep't of Ecology*, 182 Wn.2d 574, 591, 344 P.3d 199 (2015) (citing *Lummi Indian Nation v. State*, 170 Wn.2d 247, 265, 241 P.3d 1220 (2010)).

II. ARGUMENT

A. Section 1706 of the 2010 Legislation Preserved Both the Collateral Estoppel Effect of *Dot Foods I* and the Judgment's Direct Application to Periods Up to the Date of Judgment.

1. The Department Fails to Recognize that Dot Foods's Collateral Estoppel Claim Rests on Section 1706 of the 2010 Legislation, not on *Dot Foods I* Alone.

On pages 33 to 37 of the DOR Reply, the Department takes pains to show that Dot Foods is not entitled to collateral estoppel based on the judgment in *Dot Foods, Inc. v. Dep't of Revenue*, 166 Wn.2d 912, 215 P.3d 185 ("*Dot Foods I*") (2009), ***standing on its own***. Under the standard criteria for collateral estoppel, accurately reproduced on page 34 of the

DOR Reply, the Department argues two points: First, that Dot Foods cannot show the issue in this case is identical to the issue in *Dot Foods I* because the law was changed retroactively by Section 402 of 2ESSB 6143, Laws of 2010, 1st Spec. Sess., ch. 23 ("2010 Legislation"), and second, that it would be an injustice to the Department and the legislature to deprive the Department of an opportunity to show that Dot Foods is not qualified for the exemption under RCW 82.04.423 (the "DSR Exemption") as amended by the 2010 Legislation.

This is all beside the point and wastes the Court's time. Dot Foods has never claimed collateral estoppel rights or benefits based on the judgment in *Dot Foods I* alone. Dot Foods has never claimed that it is entitled to the DSR Exemption under the amended terms of the statute. *See* Dot Foods' Response/Cross-Appeal ("Dot Foods Cross-Appeal") at 36. *See also* CP 426 (Dot Foods' Reply in Support of Summary Judgment).

Dot Foods' argument is premised on Section 1706 of the 2010 Legislation and its interplay with collateral estoppel. The Department makes two implicit admissions in this regard. First, the Department does not dispute Dot Foods' position (see pages 37-38 of the Dot Foods Cross-Appeal) that Dot Foods was entitled to collateral estoppel benefits directly from *Dot Foods I* up to May 1, 2010 (the effective date of Section 402 of

the 2010 Legislation). *See* 2010 Legislation § 1708 (providing general effective date of May 1, 2010); *see also* RCW 82.04.423 (expressing repeal date of May 1, 2010). Second, the Department implicitly acknowledges that the *only* reason why collateral estoppel does not apply directly from *Dot Foods I* is the retroactive amendment. Hence, Dot Foods' focus on the scope of Section 1706 of the 2010 Legislation is the critical issue.

Contrary to the Department's view, both the plain meaning and the indicia of the legislative intent embodied in the text of Section 1706 of the 2010 Legislation – "Section 402 of this act does not affect any final judgments, not subject to appeal, entered by a court of competent jurisdiction before the effective date of this section" – point to granting the relief Dot Foods seeks.

2. The "Plain Meaning" of Section 1706 Extends Dot Foods' Unique Treatment Through the Periods in Question.

The plain meaning of Section 1706 is to be "derived from what the Legislature has said in its enactments," to be "discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). The "plain meaning" of individual words may be derived in consultation with

dictionaries. *See, e.g., State v. Barry*, 183 Wn.2d 297, 307-08, 352 P.3d 161 (2015).

There are two critical components of the text of Section 1706 – the retroactive amendment did not (1) "affect" (2) "any final judgments." What are the meanings of "affect" and "any final judgments," and what is the meaning of the phrase as a unit? The Department's plain meaning analysis, pages 38 to 39 of the DOR Reply, does not address the meaning of "affect" at all, and its interpretation of "final judgment" asserts only that Dot Foods' own judgment dealt specifically with the 2000-06 time period and did not expressly address a *refund claim* for the 2006-07 time period. The Department's analysis does not begin to explore what the *legislature* meant by "final judgment."

The word "affect" is defined in *Webster's Third New International Dictionary* (2002) as "**1 :** to act upon: **a :** to produce an effect (as of disease) upon <a condition *~ing* the heart> **b** (1) **:** to produce a material influence upon or alteration in <rainfall *~s* plant growth> <areas *~ed* by highway construction> (2) **:** to have a detrimental influence on – used esp. in the phrase *affecting commerce* " *Id.* at 35. *Random House Unabridged Dictionary* (2d ed. 1987) defines "affect" as "to act on; produce an effect or change in." *Id.* at 33. *Black's Law Dictionary* (10th ed. 2014) defines "affect" as "Most generally, to produce an effect on; to influence in some

way." *Id.* at 68. An older edition of *Black's Law Dictionary* (5th ed. 1979) spun this sense out in more detail: "To act upon, influence; change; enlarge or abridge; often used in the sense of acting injuriously upon persons and things." *Id.* at 53.

"Finality" in a judgment is a question either of the effects of the judgment or of its appealability. *See* Restatement (Second) of Judgments (1982) § 13 & comment b (drawing a distinction between finality for preclusion purposes and finality under statutes providing for appellate review). Because the legislature specified in Section 1706 that the protected "final judgments" were those no longer subject to appeal, the plain meaning of Section 1706 was that the retroactive amendment was not to affect (defined as "produce a change in" or "enlarge or abridge") *the preclusive effects* of this class of final judgments. These preclusive effects are (1) res judicata – which includes merger, bar, and claim preclusion – and (2) issue preclusion or collateral estoppel. *Id.* & comments a and g. Because Dot Foods had both res judicata and collateral estoppel rights under *Dot Foods I* on the day the legislature enacted the 2010 Legislation, Section 1706 in its plain meaning preserved those rights.

Other provisions of the 2010 Legislation bear out this understanding of the plain meaning of Section 1706. Section 201 of the 2010 Legislation was another retroactive increase in state taxes enacted in

the same bill, imposing a duty on the Department to disregard certain defined "tax avoidance transactions" and imposing additional tax retroactively to January 1, 2006. *See* 2010 Legislation §§ 201, 1703. The legislature pointedly omitted any provision that the retroactive effect of Section 201 would not "affect any final judgments." No such reservation was adopted.[1] Nevertheless, this retroactive tax increase was also *necessarily* subject to the constitutional restriction that retroactive legislation cannot "affect a final judgment." *Haberman v. Washington Public Power Supply Sys.*, 109 Wn.2d 107, 744 P.2d 1032 (1987). By specifically protecting final judgments from the effects of Section 402 of the 2010 Legislation, while omitting any express protection of final judgments from the effects of Section 201, the legislature demonstrated a difference of intent. Section 1706's express exemption from Section 402 plainly exceeds the scope of the implied constitutional limitation on Section 201. "Different statutory language should not be read to mean the same thing." *Ass'n of Wash. Spirits & Wine Distrbs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 353, 340 P.3d 849 (2015) ("*Wash. Spirits*").

[1] Instead, the legislature provided in Section 202 of the 2010 Legislation that the tax avoidance provision would not apply to taxpayers that had acted in conformance with Department instructions or publications.

Applying this plain meaning to Dot Foods' final judgment, the conclusion is unavoidable that the legislature intended to honor the preclusive effects of *Dot Foods I*, whether they be issue or claim preclusion, as an exception to the retroactive amendment.

3. If Section 1706 Is Ambiguous, External Sources Confirm that the Legislature Did Not Intend to Deprive Dot Foods of the Exemption Prior to the Repeal's Effective Date.

The Department contends on page 40 of the DOR Reply that, if legislative history were consulted in this case in order to clear up any ambiguity, the legislative history would support an interpretation of Section 1706 that only the original refund claims for 2000-06 were protected. This contention is flatly contradicted by the House Bill Report in question, which expressed preservation of rights *personal to Dot Foods* The House Bill Report's comment was not limited to filed refund claims. "The retroactive change ***will not impact the taxpayer*** that prevailed in the Dot Foods decision." CP 453 (61st Legis., House Bill Report, ESSB 6143, at 16) (emphasis added).

Moreover, the contrast in the 2010 Legislation's treatment of its two retroactive provisions – the express preservation of final judgments from the effects of Section 402 (the DSR Exemption amendment) and the omission of such a preservation from the effects of Section 201 (the tax

avoidance provisions) – is part of a pattern of practice in the legislature's other retroactive tax statutes. These statutes show that the legislature chooses different approaches to retroactive amendments, despite the bedrock constitutional principle that a retroactive amendment cannot reverse a final judgment.

- Laws of 2013, 2d Spec. Sess., ch. 8. Sections 101(4), 107, and 111 effected a retroactive amendment of RCW 82.08.0289 (a residential telephone service exemption from sales tax) *without expressly preserving final judgments*.
- Laws of 2013, 2d Spec. Sess., ch. 2. Section 10 *preserved final judgments* from the retroactive amendments of the Estate and Transfer Tax.
- Laws of 2011, ch. 23. Sections 1(3), 2, 3, and 9 restricted the sales tax exemption for manufacturing machinery and equipment retroactively to 1995 *without expressly preserving final judgments*.
- Laws of 2010, 1st Spec. Sess., ch. 16. Sections 2 and 15 restricted eligibility for certain sales tax deferral programs retroactively *without expressly preserving final judgments*.

- Laws of 2009, ch. 494. Sections 2 and 4 amended a B&O tax deduction for the sale of certain fuels retroactively to 1986 *without expressly preserving final judgments.*

This list shows a consciousness in the legislature of the difference between expressly preserving final judgments and relying on judicial enforcement of the underlying constitutional principle that the legislature may not reverse a final judgment. All of these enactments came after *Haberman's* pronouncement that an act "affect[ing] a final judgment" violates separation of powers, *Haberman*, 109 Wn.2d at 144, as well as the Supreme Court's reiteration of that principle in *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 626, 90 P.3d 659 (2004). The contrast in this pattern of legislation supports interpreting Section 1706 as conveying something more than the res judicata effect of Dot Foods' final judgment, which was protected by the constitution in any event.

The Department argues at pages 39-40 of the DOR Reply that the presumption against superfluous enactments should not apply in the interpretation of Section 1706 on the ground that the legislature does it all the time – witness RCW 82.04.4286 (providing *deduction* from B&O tax for amounts the State is constitutionally prohibited from taxing) and RCW 82.08.0254 (retail sales tax exemption for sales the State is constitutionally prohibited from taxing). This argument holds no water, because these

enactments have a distinct purpose. By providing a *deduction* from B&O tax for constitutionally protected receipts, the legislature has required reporting of such receipts in the first instance, from which a deduction is then permitted. *See* Wash. Dept. of Revenue Combined Excise Tax Return, July 2015 at 3, 4 (permitting deductions for "interstate and foreign sales" under the wholesaling, retailing, service, and other classifications), *available at* http://dor.wa.gov/Docs/forms/ExcsTx/ComExcsTxRtrn/CETR_15_M7.pdf (last viewed August 13, 2015). This requirement enhances the State's audit position. Since gross retail sales must match on the B&O and sales tax sections on page 1 of the return, the B&O tax deduction also helps audit the sales tax exemption. Moreover, there is no reason to suppose that the reasons for enacting provisions as broad as the two cited by the Department are relevant to interpreting a narrowly targeted provision like Section 1706.

In summary, the Department has offered no valid criticism of the external sources of interpretation of Section 1706 offered by Dot Foods. Moreover, the Department has offered no external sources of interpretation of its own that contradict the position of Dot Foods. If ambiguous, Section 1706 must be interpreted as protecting the full preclusive effects of *Dot Foods I*

4. The *Dot Foods I* Decision Recognized its Application to All Periods through the Date of the Decision.

The Supreme Court clearly stated that *Dot Foods I* was about the interpretation of the original DSR Exemption statute and not merely about a claim of refund for a stated period. The first sentence of the opinion stated, "This case involves *a challenge to the Department of Revenue's . . interpretation* of RCW 82.04.423, which provides a tax exemption for certain out-of-state sellers." *Dot Foods I*, 166 Wn.2d at 915 (emphasis added). The Court did not allude at all to the full refund period covered by Dot Foods amended complaint, as if this were not important. *See id.* at 917 (referring to assessment for 2000 through 2003). The Court's rendition of the facts of Dot Foods' business activities was all in the present tense. *See id.* at 916.

The Court "reject[ed] the Department's interpretation" that, to be eligible for the DSR Exemption, a business could sell only consumer products. "To [interpret the statute] otherwise would add words to and rewrite an unambiguous statute." *Id.* at 921.

> Under the statutory language, Dot qualifies for the exemption ***today*** just as it did before the Department changed its interpretation. As such, Dot is not disqualified from being exempt from Washington's B&O tax to the extent *any portion* of its sales qualify for the exemption.

Id. at 921-22 (emphasis added).

Finally, the Court said with respect to both interpretive disputes in the case,

> Here, the statute at issue is not ambiguous. Because we hold the express language of RCW 82.04.423(2) does not require downstream sales to be restricted from permanent retail establishments or to consist exclusively of consumer goods, *Dot remains qualified for the B&O tax exemption* to the extent its sales continue to qualify for the exemption.

Id. at 925 (emphasis added).

This judgment determined as of "***today***" (September 10, 2009) that Dot Foods was qualified for the DSR Exemption so long as some of its sales continued to qualify under the DSR Exemption's terms. This was an explicitly prospective ruling beyond the period for which the Department assessed additional tax and beyond the additional refund periods named in the amended complaint. The judgment necessarily addressed periods prior to the date of judgment and conferred exempt *status* on Dot Foods, so long as some sales continued to qualify under the DSR Exemption's terms.[2]

---

[2] Unbeknownst to the Court, the lawyers for the parties, and the Dot Foods executives responsible for the case, Dot Foods' sales team in fact had changed certain operational practices as of January 1, 2008, which resulted in disqualifying Dot Foods from the DSR Exemption after that date. CP 290. This fact does not undermine the force of *Dot Foods I* with respect to periods prior to the September 10, 2009, date of judgment; in fact, it demonstrates how the judgment appropriately applied the statute to Dot Foods' status as

There is nothing novel about the Supreme Court's approach. Many cases, notably declaration judgment actions, require the court to resolve a dispute about the documents governing an ongoing relationship, be they contracts or statutes. *See* Section 5.b. below. The principles of judicial economy require that the court's decision apply prospectively as well as retrospectively. The alternative would be serial lawsuits involving exactly the same claims.[3]

In summary, given the Court's statements in *Dot Foods I*, the legislature's intention to honor all final judgments as they were, and the preclusive effects inherent in the *Dot Foods I* judgment, the plain meaning of Section 1706 can only be the preservation of Dot Foods' exemption from the tax so long as its sales conformed to the DSR Exemption's terms. Denying the exemption for 2006-07 "affects" the judgment in *Dot Foods I* by limiting its express and implicit scope.

---

an exempt person. The exemption depended on Dot Foods' operational attributes without regard to the pendency of a refund claim.

[3] Moreover, the Department and the courts in *Dot Foods I* were on notice that Dot Foods intended the case to apply to periods subsequent to its filed refund claims. The amended complaint in the action reserved Dot Foods' right to make additional amendments to the "appeal" to add refund claims for subsequent tax payments that were covered by the DSR Exemption, as well as requested such other relief as the court deemed fair and equitable. The Department stipulated to the amendment of the complaint. *See* Amended Appeal for Refund of B&O Taxes Exempt Under RCW 82.04.423 at 7 (filed Sept. 1, 2006) *and* Stipulation and Proposed Order Re Plaintiff's Amended Appeal (signed Aug. 24, 2006), Thurston County Super. Ct. No. 05-2-00990-7 (Dot Foods, Inc. v. Washington Dept of Revenue), docket entries 23 and 22, *available at* https://fortress.wa.gov/thurstonco/tclibecomm/. The Supreme Court's judgment was fully consistent with Dot Foods' prayer for relief.

5. The Department's Arguments To the Contrary are Unavailing.

a. The Department Objects to "Special Treatment" and Refuses to See Section 1706 for What It Is.

The Department acknowledges that Section 1706 provides the "single instance" of exceptions to retroactive application of the DSR Exemption amendment. DOR Reply at 38. Here indeed lies "special treatment," to which the Department otherwise objects. *See id.* at 37, 41. Dot Foods is a unique taxpayer, already entitled to unique exemption from the retroactive amendment, because it holds a unique final judgment.

The legislature routinely enacts general measures governing a class of persons or entities that is very small. *CLEAN v. State*, 130 Wn.2d 782, 802, 928 P.2d 1054 (1996) (citing authority). The classic example is a statute applying to cities of over 300,000 or counties of over a million. Such statutes are instantly understood to apply to Seattle or King County but they are not unlawful special legislation if population is rationally related to the subject of the act. *Id.*

Nor does Section 1706 violate the privileges and immunities clause of the State Constitution, Article 1, Section 12, as the Department insinuates. DOR Reply at 41. The Department cites no case law in support of the position that protecting the collateral estoppel effects of a

final judgment from a retroactive amendment violates the Constitution. The Department makes no effort to identify the "privilege or immunity" implicated by Section 1706 – the required first step in a privileges or immunities case. *See Wash. Spirits*, 182 Wn.2d at 359. Even if an exception from a retroactive change in law is a "privilege or immunity," the Department must show that the legislature had no "reasonable ground" for granting the privilege or immunity. *Id.* at 359-60. The text of *Dot Foods I* is reasonable ground enough – the Supreme Court said Dot Foods remained exempt under the DSR Exemption even the *day* the opinion was issued if its sales conformed to the statute's terms.

b. A Judgment Providing Continuing Relief Is Not an "Advisory Opinion."

On pages 41-43 of the DOR Reply, the Department tries to rebut the argument that *Dot Foods I* establishes rights for Dot Foods in addition to the refund claims at issue in that case by asserting that such an interpretation of *Dot Foods I* would make it an "advisory opinion" and violate separation of powers principles. The Department's position is baseless for several reasons.

First, it is fundamental that courts can grant continuing relief upon the facts presented to them, even in tax cases. The legislature specifically contemplates that the courts may grant injunctive relief against collection

of B&O tax if the taxpayer has a constitutional defense. *See* RCW 82.32.150. Washington courts have long noted that injunctive relief from unlawful taxes (where not limited by statute) and refund actions for unlawfully collected taxes sound in the same equitable principles. *See, e.g., Dexter Horton Bldg. Co. v. King County*, 10 Wn.2d 186, 196, 116 P.2d 507 (1941). Moreover, declaratory relief is a typical aspect of the prayer in state tax cases, *see, e.g., Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 827 P.2d 1000 (1992) (granting declaratory relief that county admission tax was unlawful), as it is in Dot Foods' Complaint in this case. *See* CP 7-11. Both injunctive and declaratory relief presume that the facts before the court will continue into the future and continuing relief is limited by that factor. *Cf.* CR 60(b)(6) (relief from a judgment having prospective effect may be granted upon change in circumstances making enforcement inequitable).

Second, exemption provisions like RCW 82.04.423, which provide eligible "persons" with a non-reporting position based on their factual attributes, are tailor-made for continuing relief. *See also, e.g.*, RCW 82.04.360 (B&O tax exemption for "persons" who are employees as opposed to independent contractors); RCW 82.04.424 (B&O tax exemption for "persons" making sales in Washington if their in-state activities are limited to conducting web-based advertising or order or

payment processing on in-state servers). Since the DSR Exemption and other, similarly drawn exemptions create an exempt, non-reporting position, the fact that the statutes also create a reporting schedule under RCW 82.32.045 for *taxable* persons, *see* DOR Reply at 43, cannot mean that continuing relief is *ipso facto* unavailable from the courts.

Third, the Supreme Court was very explicit *in Dot Foods I* that it viewed the facts in the case as current, not confined to a period in the distant past. Its rendition of the facts was in the present tense and it expressly stated that its holding applied "today." The Department's suggestion that *Dot Foods I* was not limited to the facts before it is spurious.

Fourth, the Department mischaracterizes this Court's the opinion in *AOL, LLC v. Dep't of Revenue*, 149 Wash. App. 533, 205 P.3d 159 (2009). The opinion actually supports Dot Foods' argument. The passage cited by the Department, at page 548 of the opinion, dealt with assessments of tax by the Department, which are obviously retrospective in character and have nothing to do with continuing relief under a judgment. Much more to the point, AOL was not seeking prospective relief. It claimed that it could pay one month's taxes from within a four-year assessment period and maintain a refund suit for that month without paying the balance of the assessment, arguing in part that a refund

judgment for that one month would not be res judicata for any other period. *See AOL*, Appellant's Brief on Appeal at *7 n. 7, 2008 WA App Ct Briefs LEXIS 1074 (citing *inter alia* the inapposite federal income tax case, *Commissioner v. Sunnen*, 333 U.S. 591, 598, 68 S. Ct. 715, 92 L. Ed. 898 (1948)). This Court saw through the argument:

> [I]t appears that AOL filed an amended return and paid contested taxes for only January 2000 in order to challenge taxes for the entire four-year audit period without first paying the required full $19,135,970 assessment. If successful in obtaining a court ruling on the validity of that single month's tax, AOL might then have argued that such ruling was, in effect, *a declaratory ruling*, binding on the entire four-year assessment at issue in its pending administrative appeal.

AOL, 149 Wash. App. at 546 n.15 (emphasis added). AOL clearly could have paid the full assessment and brought suit for all prior periods. Dot Foods did bring suit for all prior periods; the years in question were those during the long course of litigation. *See* "Amended Appeal," *supra* n.3.

Fifth, the closest analogue to Dot Foods' case in Washington judicial history is *State v. Pac. Tel. & Tel. Co.*, 9 Wn.2d 11, 113 P.2d 542 (1941). In that case, (i) the taxpayer had previously won an injunction that the State was not authorized by statute or under the Commerce Clause to impose use tax on certain personal property, *see Pac. Tel. & Tel Co. v.*

Henneford, 195 Wash. 553, 81 P.2d 786 (1938), (ii) intervening Commerce Clause decisions by the U.S. Supreme Court eliminated the constitutional concern; (iii) the legislature (in 1939) amended the statute retroactively to the original enactment (1935) to impose tax on the use of property where the Court held it was not taxable, Laws of 1939, ch. 9 § 3 (amending Laws of 1935, ch. 180, § 35(b)), (iv) the legislature made *no* express effort to preserve the effect of the taxpayer's prior judgment, *see id.*, and (v) the tax agency then sued to collect use tax from the very same taxpayer on "exactly the same" property that was involved in the first case as well as "property of like kind and character purchased *since the judgment in that case was rendered.*" *Pac. Tel. & Tel.*, 9 Wn.2d at 13 (emphasis added). In other words, the new tax assessment was for all periods before the effective date of the amendment, both before and after the Court's 1938 decision (1935 to February 28, 1939).

The Supreme Court denied collection of the tax on two grounds: the initial judgment was *res judicata* between the parties and the retroactivity of the amendment was invalid on due process grounds because the four-year period exceeded the length of any other retroactive tax increases that the U.S. Supreme Court had ever validated. *Id.* at 16-17. The case stands for the propositions that prospective relief against an unlawful tax is presumptively available at equity and that such a judgment

applies against the State even though the facts of each relevant *future* transaction are not before the court at the time of judgment.

In summary, the legislature's decision to respect the preclusive effects of *Dot Foods I* was completely consistent with standard principles of state tax litigation and jurisprudence.

6. This Court Should Affirm the Trial Court on This Statutory Ground If Possible.

It bears repeating that this case should be resolved on the basis of the legislature's express will not to "affect" *Dot Foods I* pursuant to Section 1706 of the 2010 Legislation if possible, rather than on constitutional grounds. *See Ralph v. Dep't of Natural Resources*, 182 Wn.2d 242, 248, 343 P.3d 342 (2014) (citing *Community Telecable of Seattle, Inc. v. City of Seattle*, 164 Wn.2d 35, 41, 186 P.3d 1032 (2008)). "We have consistently stated that appellate courts should refrain from addressing constitutional issues unless *necessary* to the case's disposition." *Niemann v. Vaughn Community Church*, 154 Wn.2d 365, 369 n.1, 113 P.3d 463 (2005) (emphasis added). "[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Nat'l Fed. of Indep. Business v. Sibelius*, ___ U.S. ___, ___, 132 S. Ct. 2566, 2594, 183 L. Ed. 2d 450 (2012) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)) (internal quotation marks

omitted); *id.*, 132 S. Ct. at 2600 ("[W]e have a duty to construe a statute to save it, if fairly possible.")

In this case, the Court's choice is between interpreting Section 1706 as (1) expressing the legislature's intent to cut off the inherent preclusive effects of *Dot Foods I* at the close of Dot Foods' then-pending refund claims, notwithstanding the judgment's express language projecting its ruling into the future and reflecting collateral estoppel principles or (2) expressing the legislature's intent to respect the express terms of *Dot Foods I* and its preclusive effect. The latter interpretation, in Dot Foods' view, is required by the plain meaning rule and is at least reasonable. Hence the judgment below should be affirmed on this ground.

B. *Hambleton* Does Not Control This Case on Separation of Powers; *Hambleton* Did Not Involve the Parties in *Bracken*.

The Department's argument on separation of powers is almost entirely devoted to the position that *In re Estate of Hambleton*, 181 Wn.2d 802, 335 P.3d 398 (2014), controls this case. *See* DOR Reply at 44-48. The Department of course is wrong because *Hambleton* did not involve application of a tax to the same taxpayers who previously won the judgment in *In re Estate of Bracken*, 175 Wn.2d 549, 290 P.3d 99 (2012).

The estates of Sharon Bracken and Barbara Nelson prevailed in *Bracken* on the issue whether the Washington Estate and Transfer Tax

applied to certain trust assets in which the deceased widows had a lifetime beneficial interest. The legislature enacted retroactive amendments to Chapter 83.100 RCW assertedly to reinstate the original intent that such assets should be included in the taxable estate. Like the 2010 Legislation, the estate tax bill provided that the retroactive amendments did "not affect any final judgment." Laws of 2013, 2d Spec. Sess., ch. 2, § 10.

The similarities end there, on this critical difference: *Hambleton* did not involve any attempt by the Department to limit the effect of *Bracken* on the Bracken or Nelson estate. *Hambleton* teaches nothing about how separation of powers applies if the legislature imposes additional tax (as the Department alleges here) on the very same taxpayer who prevailed in the prior "final judgment."

Another spurious Department claim is that Dot Foods' logic would mean that the Department could not enforce the prospective repeal of the DSR Exemption in the 2010 Legislation against Dot Foods. DOR Reply at 47. Dot Foods has never made this claim. Nor was this claim made in the prior case so like this case, *Pacific Tel & Tel* Of course, prospective legislation can terminate continuing relief under a judgment, if the later enactment does not violate a constitutional protection. *See Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431-32, 15 L.

Ed. 425 (1856), *cited in Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995).

Unlike *Hambleton*, the cases cited by Dot Foods in its prior brief do address the framework for analyzing the threat to separation of powers when legislation undermines rights theretofore held by a specific person under a specific judgment. *Cornelius v. Dep't of Ecology*, 182 Wn.2d 574, 344 P.3d 199 (2015), stated clearly that the legislature may not "disturb previously litigated adjudicative facts" consistent with separation of powers. *Id.* at 591 (citing *Lummi Indian Nation v. State*, 170 Wn.2d 247, 265, 241 P.3d 1220 (2010)). The Court made this statement in evaluating whether specific parties had water rights pursuant to any previous judgment that might have been upset by the retroactive amendment of the water rights statutes. The answer was no, there were no "previously litigated adjudicative facts" in that case because there was no prior judgment affecting the parties.

The Department wants to avoid the force of *Cornelius* in this case by relying on its mantra that *Dot Foods I* adjudicated only the refund rights of Dot Foods for 2000-06. The text of *Dot Foods I* belies this position. The Supreme Court said the case was primarily about the "interpretation" of the DSR Exemption. 166 Wn. 2d at 915, 916. This was not a time-bound question – it was a text-based question with

application to a *pattern* of conducting business. The Court, having interpreted the statute and examined the facts, held that Dot Foods was exempt "today," *id.* at 921, and "remains qualified for the B&O tax exemption." *Id.* at 926. These are "previously litigated adjudicative facts" with legal consequences, equivalent to the judicial determination of water rights that was absent in *Cornelius*. This case is the complement to *Cornelius*. Applying *Cornelius* to this case, the legislature violated separation of powers principles if indeed it intended to terminate Dot Foods' qualification for the DSR Exemption as of April 30, 2006, in the face of the express analysis and holdings of *Dot Foods I*.

III. CONCLUSION

For the above reasons, this Court should affirm the trial court's judgment.

RESPECTFULLY SUBMITTED this 4th of September, 2015.

Davis Wright Tremaine LLP
Attorneys for Dot Foods, Inc.

By _____
Michele Radosevich, WSBA # 24282
Dirk Giseburt, WSBA #13949

1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
Telephone: (206)-622-3150
E-mail: micheleradosevich@dwt.com
dirkgiseburt@dwt.com

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on September 4th, 2015, I caused to be served in the manner noted below a copy of Dot Foods' Response Brief and Brief on Cross-Appeal on counsel of record:

Michael Hall Kelly Owings Assistant Attorney General Revenue Division 7141 Cleanwater Drive S.W. P.O. Box 40123 Olympia, WA 98504-0123 juliej@atg.wa.gov michaelk@atg.wa.gov kelly02@atg.wa.gov susanB5@atg.wa.gov	Via U.S. Mail and Electronic Mail

DATED this 4th day of September, 2015.

Elaine Huckabee